IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, *et al.*,
Appellants,

v.

NANCY REMILLARD, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of California is reported at 325 F. Supp. 127.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Appellants.

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

This case involves Article I, Section 8, Article VI, Clause 2 and the Fourteenth Amendment of the Constitution of the United States. This case also involves certain provision of the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. Sections 301-1394), specifically, Title 42, United States Code Sections 601, 602(a)(10) and 606(a).

Also involved in this case are United States Department of Health, Education and Welfare "Handbook of Public Assistance Administration," part IV, Section 3422 and California Department of Social Welfare Regulation EAS Section 42-350.

The text of each of these statutes and regulations is set forth in the Appendix of Appellants' brief.

QUESTIONS PRESENTED

California State Department of Social Welfare Regulation No. EAS 42-350 prohibits the payment of welfare benefits under the Aid to Families with Dependent Children program (42 U.S.C. Sections 601-10) to otherwise eligible families where a parent is absent from his home due to military service. The questions presented are:

1. Whether EAS 42-350 is invalid under the Social Security Act and the Supremacy Clause of the United States Constitution.

2. Whether EAS 42-350 is invalid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Whether EAS 42-350 is invalid under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year old child. On May 31, 1969, Gregory Remillard, the husband of Nancy Remillard and the father of Karen Marie Remillard, enlisted in the United States Army. In March, 1970, he re-enlisted for five years. On July 2, 1970, he was sent to Vietnam where he was stationed for approximately one year. Nancy Remillard applied for Aid to Families with Dependent Children (AFDC) benefits on December 16, 1969. At that time, the amount of the monthly allotment Mrs. Remillard was receiving by virtue of her husband's military service was less than her "need" as computed by the California Department of Social Welfare and was less than the monthly AFDC grant an adult with one child receives in California. However, despite her obvious need, the Contra Costa County Department of Social Services refused to grant Mrs. Remillard AFDC benefits on the ground that California policy was to not consider military absence as "continued absence" so as to create the fiction that in the Remillard home there was no continued absence of a parent and therefore no "dependent child" eligible for AFDC benefits.[1] (A. 9, A. 16).

In September, 1970, Mrs. Remillard's Allotment check was stopped. On September 10, 1970, she again applied for AFDC benefits with the Contra Costa County Department of Social Services. Although she had absolutely no money, she was again denied AFDC benefits, this time on the basis of California State Department of Social Welfare Regulation No. EAS 42-350, which had been adopted earlier in the year and

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[1] The Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. Section 301-1394) provides for financial help to families with "dependent children." 42 U.S.C. 606(a) provides: "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent (and who is living with certain specified relatives and fulfills certain age requirements not in question here)."

which specifically prohibited the payment of AFDC benefits to needy families where the absence of a parent is due to military service (A. 9)

In October, 1970, the Red Cross, which had been working on Mrs. Remillard's case, informed her that they did not know when or if she would receive an allotment check. (A. 17)

On October 21, 1970, Mrs. Remillard, on behalf of herself and all others similarly situated, filed the action below seeking a declaration of the invalidity and an injunction restraining the enforcement of EAS 42-350 on the grounds that it was in conflict with the Social Security Act and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. (A. 10-11) At that time the Honorable Judge Wollenberg of the United States District Court for the Northern District of California issued a temporary order restraining appellants from denying AFDC benefits to the Remillard family on the basis Mr. Remillard's absence from the home for military service was not continued absence. (A. 37)

On January 20, 1971, Joyce Faye Dones, a member of the class represented by Mrs. Remillard, applied to the United States District Court for the Northern District of California for an order extending the temporary restraining order to her. (A. 39-40) Mrs. Dones, prior to October, 1970, lived with her husband and their two children. She was also expecting a third child to be born in January, 1971. While they were living together, Mr. Dones earned approximately $600.00 per month and supported his family. In October, 1970, Mr. Dones was drafted into the United States Army and sent to Fort Ord, California. When he left, the family had no money in the bank or property which could be sold to provide for living expenses. Because of her young children and her pregnancy, Mrs. Dones was unable to seek employment.

When Mrs. Dones did not receive her allotment check she applied for AFDC benefits with the Contra Costa County Department of Social Services. Her request was denied on the basis of EAS 42-350. Her first allotment check did not arrive until December 18, 1970. It was for $145.00. This amount is less than her "need" as computed by the California Department of Social Welfare and less than Mrs. Dones would have received in AFDC benefits if her husband had been absent from the home for a reason other than military service. (A. 41-44) On January 20, 1971, the Honorable Judge Wollenberg signed an order extending the temporary restraining order to Mrs. Dones. (A. 46)

On February 25, 1971, cross motions for summary judgment were heard before a three-judge court, convened pursuant to 28 U.S.C. 2281 and 2284. It was stipulated the matter could be submitted for a final decision.

On March 31, 1971, the three-judge court, in a 2-1 decision, issued an Order Granting Declaratory Judgment and enjoining the enforcement of EAS 42-350. (325 F. Supp. 1272) Appellants have appealed from this decision.

SUMMARY OF ARGUMENT

The Court below enjoined the enforcement of a state welfare regulation which prohibited the payment of AFDC benefits to needy families where the absence of a parent is due to his military service. Appellees argue that the decision below is correct and the regulation invalid on the following grounds:

1. Congress, in the Social Security Act, mandated that, in participating states, *all* needy children who are deprived of parental support by reason of a parent's continued absence be aided under the AFDC program; no exception was created for needy families where parental absence is due to military service. *Townsend v. Swank*, ___ U.S. ___; 92 S.C. 502 (1971) further mandates that, in the absence of clear congressional authorization, state welfare programs may not exclude persons eligible for assistance under federal AFDC standards. The California regulation is not authorized by

Congress and is invalid under the federal Social Security Act and the Supremacy Clause.

2. The California regulation is invalid under the Supremacy Clause as an encroachment upon the powers of Congress to provide for national defense.

3. The regulation, which grants AFDC to needy children who have a parent absent from the home because of incarceration, deportation, divorce, desertion or separation, while it denies such benefits to needy children who have a parent absent from the home because of military service, creates an irrational distinction, and is invalid under the Equal Protection Clause of the Fourteenth Amendment.

4. The regulation is invalid under the Due Process Clause of the Fourteenth Amendment in that it impinges upon a fundamental right in the absence of a compelling governmental interest; and in that it embodies a conclusive presumption that a person who is absent from his home due to military service is not continuously absent from the home, which presumption is arbitrary, capricious and irrational.

ARGUMENT

I. INTRODUCTION.

The categorical public assistance program of Aid to Families with Dependent Children (AFDC) operates through a federal grant-in-aid mechanism, being financed largely by the Federal Government and administered by the states. While participation by a state in the AFDC program is voluntary, if a state chooses to participate in the program (as all fifty states do) it must comply with the requirements of federal law (the Social Security Act of 1935, 49 Stat. 620, as amended 42 U.S.C. Sections 301-1394) and implementing regulations of the United States Department of Health, Education and Welfare [HEW] in order to be eligible for federal funds. *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

The category singled out for welfare assistance by AFDC is the "dependent child" who is defined in Section 406(a) of the Social Security Act [42 U.S.C. 606(a)] as a "needy child" . . . "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent (and who is living with one of several listed relatives and who fulfills certain age requirements.)"

Section 402(a)(10) of the Federal Act [42 U.S.C. 602(a)(10)] requires that each participating state must provide "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

At issue in this case is the validity of a California Department of Social Welfare Regulation[2] which states that no continued absence exists so as to qualify a child and his parent for AFDC benefits if the absence of the other parent is due to his military service. Appellee contends that such regulation is invalid under controlling federal law and the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. The three-judge court below did not decide the constitutional issues presented but found them "sufficiently compelling" to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California and held the regulation invalid and enjoined its enforcement.

II. CALIFORNIA'S EXCLUSION OF NEEDY "MILITARY ORPHANS" FROM AFDC BENEFITS VIOLATES THE FEDERAL SOCIAL SECURITY ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Townsend v. Swank, ___ U.S. ___. 92 Sup. Ct. 502 (1971), reaffirms the holding of *King v. Smith*, 392 U.S. 309 (1968), that "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social

[2]EAS Section 42-350.

Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is invalid under the Supremacy Clause." It further holds that regulations of the Department of Health, Education and Welfare that allow such state exclusions are invalid under the requirements of 402(a)(10) that aid be furnished to *all eligible* individuals.[3]

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[3]Insofar as *King v. Smith* needed any clarification, lower courts almost unanimously anticipated the ruling in *Townsend v. Swank*. The above principle was applied to numerous cases involving state infringement upon federal AFDC eligibility standards. *Woods v. Miller*, 318 F. Supp. 510 (W.D. Pa., 1970), state regulations providing for discontinuance of AFDC benefits to recipients who refused to file suit against responsible relatives contravened Social Security Act requirement that aid be furnished promptly to all eligible individuals and were invalid; *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa., 1970), state regulations providing for recovery of an overpayment by means of a reduction in subsequent grant payments invalid; federal duty imposed by 42 U.S.C. 602(a)(10) is breached if an otherwise eligible child is deprived of AFDC funds because of parental misconduct; *Doe v. Shapiro*, 302 F. Supp. 762, 764 (D. Conn. 1969), appeal dismissed for untimely filing, 396 U.S. 488 (1970), state regulation providing for termination of AFDC benefits to illegitimate children whose mothers refused to disclose the name of their father invalid in that it imposed an additional condition of eligibility that was not required by the Social Security Act; *Damico v. State of California*, CCH Pov. L. Rptr. No. 10,477 Nos. 46538, 48462 (N.D. Calif., Sept. 12, 1969), regulation that, in separation cases, there was no "continued absence from the home" unless the absence was for ninety days or legal action to dissolve the marriage had been instituted invalid; *Doe v. Hursh* (D. Minn., June 30, 1970) Civ. No. 4-64-463; *Stoddard v. Fisher*, 330 F. Supp. 566 (1971), state may not deny AFDC benefits to needy children of enlistees; *McCullough v. Hursh*, No. 4-71 Civ. 173 (D. Minn. July 6, 1971) (Opposition to Motion for Reinstatement of Stay of Injunctive Order, Exhibit B), state may not deny AFDC benefits to "military orphans;" *Linnane v. Betti*, 331 F. Supp. 868 (D. Vt., 1971); *Sterrett v. Grubb*, 315 F. Supp. 990 (N. D. Ind.), aff'd. 400 U.S. 922; *Martin v. Taylor* (N.D. Calif., May 24, 1971) aff'd.____ U.S.____ 40 L.W. 3262; *Weaver v. Doe*, 332 F. Supp. 61 (N.D. Ill.) aff'd.____ U.S.____, 92 S. Ct. 537. *Juras v. Meyers*, 327 F. Supp. 759 (D. Ore.) aff'd.____ U.S. ____, 92 S. Ct. 91; state may not, consistent with Social Security Act, condition AFDC payments on parent's cooperation in collection efforts.

The question presented for this court is twofold: 1) Are plaintiffs, and the members of their class, federally eligible for AFDC benefits? 2) If so, does the Social Security Act, or its legislative history, clearly evidence congressional authorization for states to exclude "military orphans" from AFDC benefits?

A. "Military Orphans" Are Federally Eligible for AFDC Benefits.

Throughout this case all parties have agreed that there is no question but that needy families in which a parent is absent from the home because of military service are federally eligible for AFDC benefits (A. 83; Jurisdictional Statement, page 9). There is no question but that federal monies are now available if a state chooses to furnish AFDC to needy families where parental absence is due to military service.[4] In spite of this previous agreement, appellant, in his brief (pages 16-19), argues for the first time that the Social Security Act precludes states from paying AFDC benefits to military orphans. Because of the enormity of this proposition[5] appellees will deal with this aspect of Appellant's argument first.

[4] At the hearing on the cross motion for summary judgment, plaintiff submitted statistics that twenty-four states and the District of Columbia do furnish AFDC benefits to servicemen's needy families; twenty states and Puerto Rico do not furnish AFDC benefits to the needy families of servicemen; two states limit aid to the families of draftees; two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft; information was not available for two states. (A. 72). See also, letter from Jules M. Berman, Chief, Division of Program Payment Standards, HEW, to Michael Weiss, Center on Social Welfare Policy & Law, (A. 33) and Brief for the United States as Amicus Curiae, page 15.

[5] Acceptance of this argument would necessarily entail the termination of AFDC benefits for those needy military families now receiving aid in twenty-four states and the District of Columbia, loss of funds to these states, and perhaps a profound effect on the economy of certain of these states (See Note 4). These families and these states are not represented before this Court except insofar as Appellees class now consists of needy persons who are receiving AFDC benefits pursuant to the decision below. When this case was filed, the class consisted of persons who were denied AFDC benefits (A. 6), and the questions presented for the Court were substantially different.

Appellees have no quarrel with the State's assertions that "the heart of any program for Social Security must be the child,"[6] and that

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[O]ne clearly distinguishable group of children' H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). This group was composed of children in families without a 'breadwinner,' 'wage earner'; or 'father,' as the repeated use of these terms throughout the report of the President's Committee, Committee Hearings & Reports and the floor debate makes perfectly clear . . . A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent. *King v. Smith*, 392 U.S. 309, 328-329 (1968) (footnotes omitted).

Indeed, appellees would cite these same words to support the proposition that they are within the federal definition of "dependent children."

The Social Security Act quite clearly defines a dependent child as "a needy child who has been deprived of parental support or care by reason of . . . *continued absence from the home* . . . of a parent[7] (emphasis supplied). Appellant admits: "that the father is absent in this situation is clear." (Jurisdictional Statement, page 7). Where statutory language is clear and unambiguous that language should be enforced according to its terms. *Adams Express v. Kentucky*, 238 U.S. 190 (1915), *Caminetti v. United States*, 242 U.S. 470 (1917).

There is no language in the Social Security Act to indicate that when Congress said "continued absence from the home" it meant "continued absence from the home except by virtue of military service."[8] President Roosevelt, in recommending

[6] S. Rep. No. 628, 74th Cong., 1st Sess., 16-17 (1935) *King v. Smith*, 392 U.S. 309, 327 N. 24.

[7] 42 U.S.C. 606(a).

[8] Unlike much of Title IV, including other parts of Section 406(a) the 'continued absence from the home' element of that provision has remained unamended since the Act's original enactment in 1935.

the permanent entry of the federal government into the field of public assistance, referred to "children deprived of a father's support" as those who should be aided by a federal grant-in-aid program. Message of the President Recommending Legislation of Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 29 (1935). Similarly, the House Committee on Ways and Means referred in general terms to the beneficiaries of Title IV as "those (children) in families lacking a father's support," H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935) and the Senate Committee on Finance made reference to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong. 1st Sess. 12 (1935). (The Senate Committee went on to note that "these are principally families with female heads who are widowed, divorced, or deserted," id., but neither stated nor implied that eligibility by virtue of parental absence was to be limited to cases of divorce or desertion.)

Appellant has attempted to show that military families are not eligible for AFDC because military men are "breadwinners." However, whether or not the absent parent is actually a "breadwinner" within the meaning of the Act[9] is irrelevant as the family has been actually deprived of the

[9] *Kennedy v. State of Washington*, Wash. P.2d 154, 157 (1971) held, on grounds not argued in this case, that the state could not deny AFDC benefits to needy families where a parent was drafted into the military. That case noted:

> Employers ... ought not be permitted to look to tax-supported public assistance and public welfare programs as a means or source of supplemental income to their employer and as a device by which to maintain an inadequate wage system for regular gainful employment. Public Assistance should not become a subsidy for substandard employers.
>
> But (Mrs. Kennedy's) husband is not in private employment. He has little control over his family's economic destiny. He has no labor union or other agency to look to as a means of persuading his employer to pay him a living wage. He is without access to collective bargaining or any negotiating forum or other means of economic persuasion, or even the informal but concerted support of his fellow employees. He cannot quit his job and seek a better paying one.

[Footnote Continued]

presence and services of such "breadwinner" by his military service. (A. 16-17; 41-44)[10]

While Congress might rationally intend to help needy families with an unemployed or underemployed parent in the home by "the work relief program and . . . the revival of private industry" (S. Rep. No. 628, supra), it is irrational to assume that Congress intended that military orphans be denied AFDC benefits because of the existence of these programs. As pointed out by the Court in *Stoddard v. Fisher*,[11] "We cannot help but note the irony of a result which would deny assistance to the family of a man who finds that family disqualified from receiving AFDC on the ground that he has removed himself from the possibility of receiving public work relief by voluntarily undertaking, for inadequate compensation, the defense of his country."

The Department of Health, Education and Welfare, as the agency responsible for the implementation and administration of the AFDC program has never had any question as to whether military orphans are dependent children within the meaning of the Social Security Act.[12] While the Court has disapproved HEW's long standing policy of allowing states to

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[Footnote continued from preceding page]

> . . . And there is no action he could lawfully take to make his earnings adequate while putting in full time on his job. His was a kind of involuntary employment where legally he could do virtually nothing to improve the economic welfare of his family.

[10] See *Lewis v. Martin*, 397 U.S. 552 (1970), referring to the Act's basic purpose of providing aid to 'needy' children except where there is a 'breadwinner' *in the house* who can be expected to provide such aid himself (emphasis supplied).

[11] 330 F. Supp. 566, 571 N. 8.

[12] Section 3422 of the HEW Handbook of Public Assistance Administration provides:

> *3422. Continued absence of the parent from the home.*
>
> 3422.2 Interpretation-Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances;

[Footnote Continued]

vary AFDC eligibility requirements from federal standards,[13] it is submitted that HEW's interpretation of Section 406(a) as including military orphans within its coverage is due substantial weight.[14]

The federal Social Security Act commands in its clear language, by its legislative history, and through the administrative interpretation of HEW, that families in homes where a parent is absent because of his military service be granted AFDC benefits if otherwise eligible.

[Footnote continued from preceding page]

1. When the parent is out of the home.
2. When the nature of the absence is such as either to interrupt, or to terminate, the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and,
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support of the child . . .

A military orphan clearly comes within the above definition. However, Section 3422.2 further provides specifically:

Within this interpretation of continued absence, the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service and imprisonment.

See 45 C.F.R. 233.90(b), 35 Fed. Reg. 8788; 45 C.F.R. 203.10(a), 35 Fed. Reg. 8786.

[13] *King v. Smith*, 392 U.S. at 333 n. 34; *Townsend v. Swank*, ___ U.S. ___; 92 S.Ct. 502.

Note, Welfare's "Condition X" 76 Yale L.J. 1222 (1967).

[14] *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

B. There Is No Congressional Authorization for States To Exclude "Military Orphans" From AFDC Benefits.

Appellant argues that Congress has mandated that the term "continued absence" be administratively interpreted by HEW and that HEW's interpretation of the term is compatible with California's refusal to recognize "absence due to military service" as "continued absence." Appellant further argues that HEW may validly delegate to the states the decision as to what kind of absences will give rise to AFDC eligibility.

HEW's definition of "continued absence" quite clearly includes the father absent from his home because of military service.[15] The second argument ignores the clear language of *Townsend v. Swank*, "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act" (___ U.S. ___; 92 S.Ct. 502).

Appellant's contention that there is no "Congressionally mandated nationally uniform implementation of that (continued absence) test of dependency and AFDC eligibility" ignores the holding of *King v. Smith, supra.* In that case the state argued that its substitute father regulation simply defined who is a nonabsent "parent" under Section 406(a) of the Social Security Act (392 U.S. 317-318) as the State argues in this case that its military exclusion rule defines who is a "nonabsent parent" under the same section.

The *King* case dealt with the "transparent fiction" that a man who cohabited with a woman was a parent to that woman's children. This case deals with the "transparent fiction" that a man who, in reality, is absent from his home, is, under the state regulations, not absent. *King* dealt with this "fiction" by stating: [T]he Act clearly requires

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[15] See Notes 4, 12, *supra.*

participating states to furnish Aid to families with children who have a parent absent from the home . . . id. at 317.

The military service exception cannot be rationalized on other grounds. It is not a general exclusion from eligibility of families in which parental absence is voluntary, since the California regulation forbids AFDC payments to needy families of both enlistees and draftees and, furthermore, aid is granted in cases of voluntary absence due to separation, divorce, or desertion. Nor may the exception be viewed as a general exclusion of cases in which the absence is for a set time as opposed to an unknown time, as aid is granted in cases where a parent is in jail for a particular time period. Nor may the exception be viewed as a general exclusion of cases where the family is receiving some money as a result of the absent parent's activities, as a needy family where the absence of a parent is for reasons other than military service may also be receiving money from the absent parent. The absent parent may be fully employed and earning a comfortable salary; however, if the amount of money the family receives from an absent parent is below that family's "need" as determined by the California Department of Social Welfare, the Department will grant the family AFDC benefits in the amount of the difference between the family's "need" and the family's income. The Department will do this except where the absence of the parent is due to his military service.

Regulations must be analyzed in light of the paramount goal of AFDC, the protection of (dependent) children. *King v. Smith, supra* at 325. The question of deprivation "must focus on the child, not on the legal status of the parents." *Damico v. California, supra.* California's military service exception has the effect of carving out a group of children who come within the federal definition of "dependent child" set forth in Section 406(a) and denying them eligibility for something their parent has done, i.e., been drafted into or enlisted in the Armed Services. In California, needy children are granted AFDC benefits if they have a parent absent from the home because of divorce, separation, desertion, incarcera-

tion, deportation or hospitalization. In this case, Karen Marie Remillard was deprived of the presence of her father for more than a year. As appellant states in his brief, page 17, "Public assistance through AFDC 'was intended to provide economic security for children,' (*King v. Smith*) only in the limited family situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similar type of substantial intra-familial dissociation, denominated by Congress as a 'continued absence' ". In military cases there has been substantial intra-familial dissociation, as witness the plight of the Dones family which had their "breadwinner," earning $600.00 per month, removed from their home by the United States Government, sent to a place where the family could not join him, and which was then faced with the prospect of having no income for two months and only $145.00 per month after that. (A. 41-44)

Rather than leave the matter to the states, Congress did define the kind of absence that triggers AFDC eligibility. Any parental absence must be "continued" if the needy child is to receive assistance. Beyond that limitation, Congress has authorized no further narrowing of the class. Accordingly, *Townsend v. Swank, supra*, is controlling in this case, and 42 U.S.C. 601, 602(a)(10) and 606(a) and the Supremacy Clause of the Constitution command that California not exclude military orphans from AFDC benefits.[16]

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[16] The interaction of the Supremacy Clause with the Social Security Act is not needed to reach the same result under the concurring opinion of Chief Justice Berger in *Townsend v. Swank.*

III. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO NEEDY FAMILIES WHERE A PARENT IS ABSENT FROM THE HOME DUE TO HIS MILITARY SERVICE IS INVALID AS AN ENCROACHMENT UPON FEDERAL POWER TO PROVIDE FOR NATIONAL DEFENSE.

In the case of *Graham v. Richardson*, 403 U.S. 365, this court invalidated state statutes forbidding the payment of categorical aid to aliens as in violation of the equal protection clause of the Fourteenth Amendment and on the ground such statutes encroach upon the exclusive federal power over the entrance and residence of aliens. That decision held specifically that denial of welfare benefits was such an encroachment: "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with (these) overriding national policies in an area constitutionally entrusted to the Federal Government."

Article I, Sections 8 (11), (12), (13), (14), (15) and (16) of the United States Constitution provide that Congress has complete authority over the raising and maintaining of the United States Armed Services. In the absence of a clear mandate from Congress that AFDC benefits should not be paid to needy military families, appellee submits that Appellants have encroached upon the authority of Congress to raise and maintain its armies. As regards the Dones family, if Mr. Dones had refused induction and subsequently been imprisoned for this illegal act, there is no doubt that his family would have been eligible for AFDC benefits under California regulations. It is not entirely speculative that some men may choose to refuse induction rather than allow their families to live at starvation levels. Equally important, it is not unreasonable to assume that a soldier may not be able to perform his duties conscientiously if he is constantly worried about the well-being of his family. As there are approximately 43,000 military families with children that have an income below the poverty line, this is not a miniscule problem. United States Department of Commerce/Bureau of

the Census, *Current Population Reports*, Table E, 7, Table 11, 54 (1970); Laird, *Fiscal Year 1971, Defense Program and Budget*, 95 (1970). EAS 42-350 clearly encroaches upon federal power to raise and maintain armies and is therefore invalid.

IV. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED SERVICES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant disputes the District Court's finding that Appellee's constitutional arguments are compelling and suggests that they are unworthy of consideration. Although the court below based its decision on statutory grounds and avoided the constitutional issue, it is clear that the same result would have followed if the decision had been based on constitutional grounds. The effect of EAS 42-350 is to create two classes of needy families indistinguishable from each other except that one is composed of families in which a parent is absent by virtue of his service in the Military, and the other is composed of families in which parental absence stems from some other reason. Solely on the basis of this difference, the first class is denied and the second class is granted "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). Unless there is, at least, some rational reason to support this classification, it must fall as a violation of the Equal Protection Clause of the United States Constitution.[17]

[17] If this court should find that Congress intended that no military families be aided under the AFDC program, it must then determine if such action, which arbitrarily discriminates against like groups, is unconstitutional, as violative of the due process clause of the Fifth Amendment. *Bolling v. Sharp*, 347 U.S. 497 (1954). However, it has been demonstrated that, by itself, Section 406(a) has no such restrictive effect and the question presented is whether a state may, without viola-

In determining whether a state action violates the equal protection clause, courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. *McLaughlin v. Florida*, 379 U.S. 283, 288, (1964); *Carrington v. Rash*, 380 U.S. 89, (1965). The purposes of the AFDC program are set forth in Section 401 ". . . [T]he care of needy and dependent children in the home, the maintenance of family life, . . . the retention of the capability for self support." California Regulation EAS 42-350, does not further the purpose of the program by excluding from benefits one large group of families who are both needy and dependent under the Act, solely on the basis of the legal status of the absent parent.

The Equal Protection Clause requires people who are the same in fact to be treated the same in law. *Morey v. Dowd*, 354 U.S. 457 (1957); *Gulf, Colo. and Santa Fe v. Ellis*, 165 U.S. 150, 153, (1897). *King v. Smith, supra*, dictates that, in the AFDC program, the focus is on the child. As pointed out by the Court below, the state will help the needy child of a person whose incarceration may be as little as ninety days, the dependents of a divorced mother whose support payments from her absent husband are insufficient to meet basic needs, and the needy child whose parents have informally separated for but a few weeks, but nothing is given to the needy child of a soldier who, often involuntarily may remain away from home for as long as two years. 325 F. Supp. at 1274.

If a needy child's parents are "separated" and one parent is absent from the home because of military service, that child will be eligible for AFDC benefits although he has the same expectation of support from the military as is

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tion of the Equal Protection Clause of the Fourteenth Amendment, deny AFDC benefits to children on the grounds absence of a parent due to military service is not "continued absence" when it grants AFDC benefits to children who have a parent absent from the home for other reasons. Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorized the states to violate the Equal Protection Clause. *Shapiro v. Thompson, supra* at 641.

outlined in Appellant's Brief (page 21) as does the child who has a parent absent from the home because of military service but whose parents are not "separated." A regulation that so encourages legal separation of the parents does not "help maintain and strengthen family life" as required by Section 401, (See *Damico v. California, supra*) and does not "focus on the child."

Appellant's reliance on *Macias v. Richardson*, 324 F. Supp. 1252, affd. 400 U.S. 913 (1970) and the status of "underemployed" fathers is misplaced as the employment of an absent parent does not disqualify a needy child from AFDC benefits under Section 406(a) of the Act.[18] A parent separated from his family by separation or divorce may be fully employed and contributing to the support of the child; this employment will not disqualify a needy child from AFDC benefits. Further, Appellants attempt to distinguish military absence from other kinds of continued absence is misplaced. "Stigma" is not a necessary qualification for AFDC benefits and the economic condition of the members of Appellee's class is not in question (Appellants Brief, page 20). Congress mandated that all needy children deprived of parental support or care by the continued absence of that parent be eligible for AFDC benefits. Surely it matters naught to the Remillard child or the Dones children why their fathers are gone; all they know is that their fathers are not present to care for them. Appellee submits that there is no rational basis for distinguishing between a needy child whose parent is absent from the home because of separation, desertion, divorce, incarceration, hospitalization or deporta-

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[18] *Macias* dealt with the constitutionality of federal and state regulations in the AFDC-U ("Unemployed Father") program. 42 U.S.C. Section 607. One of the requirements of the AFDC-U program is that the father be present in the home. See Affidait of Katherine Hartwell, Motion to Vacate or Alter Stay, Exhibit B; Mrs. Hartwell, her husband and her child were terminated from AFDC-U benefits when Mr. Hartwell was drafted into the army. Appellees do not contend that they are eligible for benefits under the AFDC-U program.

tion and a needy child whose parent is absent because of military service.

Where a classification touches on a fundamental right, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (right to travel). See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate).

In *Carrington v. Rash, supra*, this court dealt with a Texas constitutional provision which provided that no serviceman could ever acquire a voting residence in the state so long as he remained in service. While other suspected transients such as students, patients in state hospitals and institutions, and civilian employees of the federal government could establish residency, a serviceman, no matter how long he had resided in the state and no matter what his domiciliary intentions were, could never controvert the presumption of non-residence. This Court in *Carrington* found this an invidious discrimination in violation of the Fourteenth Amendment. This case is very similar. The State of California has said that, no matter how long a serviceman is absent from his home, no matter where he is stationed, and no matter what kind of duty he is performing, his family cannot show that he is continually absent from the home.

Like the cases cited above, this case does not deal with a right that is spelled out in the Constitution. However, Appellee submits that there is a right to military service which invokes the "compelling state interest" test in analyzing state legislation which intrudes upon that right.

It has long been judicially recognized as self-evident that

> "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need . . ." *The Selective Service Draft Law Cases*, 245 U.S. 366, 375 (1918).

In *In Re Sien*, 284 F. 868, 869 (D. Mont., 1922) the Court stated:

> "The distinguishing and supreme obligation of citizenship and its permanent allegiance is military service. It has its antecedents in the feudal system wherein the vassal makes oath of fealty to his lord and services him in war, as consideration and payment for the land and protection he receives from his lord. So the citizen . . . likewise renders military service to the country in payment of and consideration for the advantages, rights and protections it extends to him."

The obligation of service being a necessary correlative of national citizenship, the right to fulfill that obligation without impediment by the state must be equally inherent in citizenship. See *Crandall v. State of Nevada*, 6 Wall. 35, 18 L.Ed. 744:

> "The people of these United States constitute one nation . . . This government has necessarily a capital established by law . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established."

And see *Edwards v. California*, 314 U.S. 160, 185 (1941), concurring opinion of Justice Jackson: "Rich or penniless, [Duncan's] citizenship under the Constitution pledges his strength to the defense of California as a part of the United States . . ."

Under the traditional "rational basis" test or the "compelling state interest" test a regulation that denies welfare benefits to needy families where a parent is absent due to military service while it grants welfare benefits to needy families where a parent is absent for other reasons violates

the equal protection clause of the Fourteenth Amendment of the United States Constitution.

V. CALIFORNIA WELFARE REGULATION PROHIBITING PAYMENT OF AFDC BENEFITS TO OTHERWISE ELIGIBLE CHILDREN WHOSE FATHERS ARE SERVING IN THE ARMED SERVICES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Any law that clearly impinges upon a fundamental right must be shown to reflect a compelling governmental interest or it must fall under the due process clause of the Fourteenth Amendment. *Shapiro v. Thompson, supra.*

This Court has held the above statement applies to such diverse rights as: the right to travel (*Shapiro v. Thompson, supra*); right to marry (*Loving v. Virginia,* 388 U.S. 1); right to privacy (*Griswold v. Connecticut,* 381 U.S. 479); right to educate one's children as one chooses (*Pierce v. Society of Sisters,* 268 U.S. 510 [1925]); right to study the German language in a private school (*Meyer v. Nebraska,* 262 U.S. 390 [1923]); right to freely associate with other persons (*NAACP v. Alabama,* 357 U.S. 449 [1958]). It is submitted that the right to serve in the military is also such a fundamental right and that EAS 42-350, by infringing upon that right, violates the due process clause of the Fourteenth Amendment.

Furthermore, EAS 42-350 violates the due process clause of the Fourteenth Amendment in that it embodies a conclusive presumption that a parent who is absent from the home, due to his military service, is not continuously absent from the home, which presumption is arbitrary, capricious and irrational. See *Leary v. United States,* 395 U.S. 6 (1969); *Tot v. United States,* 319 U.S. 463 (1943); *Heiner v. Donnan,* 285 U.S. 312 (1932); *Schlesinger v. State of Wisconsin,* 270 U.S. 230 (1926); *Mobile, Jackson and Kansas Ry. Co. v. Turnipsent,* 219 U.S. 35, 43 (1910).

Appellee does not contend that every absence due to military service renders the serviceman's family eligible for AFDC benefits. She does contend that California's refusal to grant benefits to any needy families where a parent is absent because of military service is arbitrary and capricious and constitutes a denial of due process. Appellee, and the members of her class, are forever forbidden by EAS 42-350 from proving a fact which Appellant admits is true, that the father is absent in this situation (Jurisdictional Statement, page 7). While, in a particular situation it may be difficult to determine if a parent is continually absent, this does not justify California's refusal to grant AFDC payments to any family where a parent's absence is due to military service. To deny an applicant the opportunity to show that her children are "deprived" of parental support so as to qualify them for AFDC benefits because of an arbitrary presumption that has no rational connection with the facts of the situation is to deny that applicant due process of law.

CONCLUSION

The decision below is correct. The Social Security Act commands that states grant AFDC benefits to all eligible applicants. It is quite clear that Congress never intended that military orphans be denied AFDC benefits because of their father's status, and that state action which prohibits the payment of AFDC benefits to such families is invalid under the Social Security Act and the Supremacy Clause.

Further, any state regulation which provides for the payment of Welfare benefits to needy children deprived of parental support because of the parent's continued absence from the home for reasons other than military service while it prohibits payment of such benefits to needy children deprived of parental support because of the parent's con-

tinued absence from the home due to military service, violates the equal protection and due process clauses of the Fourteenth Amendment.

Respectfully submitted,

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